

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Digital Audio Broadcasting Systems) MM Docket No. 99-325
and Their Impact on the Terrestrial)
Radio Broadcast Service)

To: The Commission

REPLY COMMENTS OF BROADCAST MUSIC, INC.

Broadcast Music, Inc. ("BMI") hereby submits these reply comments in response to the Commission's *Further Notice of Proposed Rulemaking and Notice of Inquiry* in the above-captioned proceeding, FCC 04-99 (released April 20, 2004), 69 Fed. Reg. 27874 (May 17, 2004). Specifically, BMI provides further comment with regard to digital audio content control.

Formed in 1939, BMI protects the intellectual property of its affiliated songwriters, composers and music publishers by ensuring that they are compensated for public performances of their musical works. Today, BMI represents approximately 300,000 songwriters, composers and music publishers in all genres of music. BMI licenses the public performing right in their works to a wide variety of businesses including radio and television stations, broadcast and cable television networks, Internet web sites, live concert venues and recorded background music services. BMI distributes the license fees it receives as royalties to the individual songwriters, composers and music publishers whose works were publicly performed.

BMI also has reciprocal performing right license agreements with more than 65 foreign performing right societies worldwide which permit BMI to license the public performing right in thousands of works by foreign songwriters and composers. BMI is an acknowledged leader in

developing cutting-edge international royalty accounting and collection systems. In fact, BMI is a founder of an international joint venture which develops new digital copyright management systems for use by performing right societies worldwide.

Numerous parties filed comments in this proceeding with respect to content protection for digital audio broadcasting (“DAB”). The Recording Industry Association of America (“RIAA”), in its comments, asks the Commission to adopt DAB content protection mechanisms and proposes two specific content protection regimes for digital audio broadcasts that would comply with a set of usage rules proposed by the RIAA.¹ Specifically, the RIAA proposes that digital audio broadcasts either be encrypted or protected by an audio protection flag similar to the broadcast flag recently adopted for video programming content.² Another party asks the Commission to refrain from authorizing the launch of new digital music services without adequate protection for the underlying musical works.³ Other parties suggest that it is too early for the FCC to establish a DAB content protection regime.⁴ And some parties indicate that radio broadcast stations would like to begin transmitting multiple digital streams, diversifying content, narrowcasting programming, and selling subscription services – all of which services will have an impact on content and its protection.⁵

¹ *Comments of the Recording Industry Association of America* filed June 16, 2004 (“RIAA Comments”).

² *Id.* at pp. 61-64.

³ *See Comments of the National Music Publishers’ Association* (filed June 16, 2004).

⁴ *See Comments of Corporation for Public Broadcasting, Comments of Cox Radio, Inc., Comments of Greater Media, Inc., Comments of iBiquity Digital Corporation and Comments of the National Association of Broadcasters* (each submitted on June 16, 2004).

⁵ *See Comments of Cox Radio, Inc., Comments of Entercom Communications Corp., Comments of Greater Media, Inc., Comments of iBiquity Digital Corporation and Comments of Infinity Broadcasting Corporation* (each submitted on June 16, 2004).

BMI recognizes that the world is in the midst of a digital revolution, with content transmission systems migrating from analog to digital across many platforms. The transition to DAB will be beneficial to all parties affected, especially listeners. BMI fully supports the transition of broadcast radio technology to digital. At the same time, BMI appreciates that authors and copyright owners are concerned about the impact this transition will have on their rights and protections. Without a doubt, the conversion to digital broadcasting is introducing new challenges to creative industries interested in protecting their intellectual property. Indeed, new technologies (such as unprotected, unlicensed peer-to-peer file-sharing services) already have had a significant adverse impact on the music industry. Therefore, BMI believes that it is in the mutual interest of the music industry, the radio industry and the consumer electronics industry to cooperate in the development of appropriate standards and technologies to protect against piracy in the digital arena.

However, BMI respectfully reaffirms its position (stated in its initial comments) that any proposal adopted by the Commission in this proceeding to protect digital audio content must include provisions allowing performing right organizations, such as BMI, the ability to continue their mission of electronically monitoring public performances of the musical works they represent. This will ensure that songwriters, composers and music publishers are paid properly when their musical works are performed via digital audio broadcasting technologies.

I. New Digital Audio Broadcasting Technologies Have Copyright Implications and Any FCC Action on Copyright-Related Matters Should Not Derogate From the Existing Rights of Any Copyright Holders.

Under the Copyright Act, two types of copyrighted works are protected in pre-recorded musical expression. The first is the “musical work,” which is normally owned by the songwriter and his or her music publisher. The second is the “sound recording,” which is the creator’s right

in the recording of the performance of a particular musical work (such as a CD or phonograph record) and may be owned by the artist or a recording company. Both of these rights are licensed, but in different ways. Both types of works may be affected in different ways by the exploitation of the exclusive rights that are granted to copyright owners.

One of the exclusive rights conferred on a copyright owner of a musical work is the exclusive right “to perform the copyrighted *work* publicly,”⁶ which includes all methods of transmitting musical works to the public. The Copyright Act contains broad definitions of the words “perform publicly” and “transmit.” Radio broadcasting falls within the statutory definitions and radio broadcasting transmissions are among the prime examples of public performances of musical works under the Act. The Copyright Act also grants to the owners of sound recordings a public performance right, but its scope is limited to digital audio transmissions, excluding non-subscription radio broadcasting.⁷

The other exclusive copyright rights include the right of reproduction in copies or phonorecords and the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership.”⁸ As DAB devices proliferate there may be an increased likelihood of the unauthorized reproduction and distribution of sound recordings without remuneration to the copyright owners of either the musical work or the sound recording.⁹ This is the RIAA’s primary concern.

⁶ See 17 U.S.C. §106(4) (emphasis added).

⁷ *Id.* at §§106(6) and 114(d)(1)(A).

⁸ *Id.* at §§106(1) and (3).

⁹ Although these are separate rights, a public performance and a distribution of a reproduction can occur at the same time as a result of the architecture of certain new digital transmission devices.

BMI agrees with the RIAA that the Audio Home Recording Act of 1992 (“AHRA”) was not intended to address the harm to copyright owners that may result from the widespread use of DAB devices to search broadcasts using metadata to collect libraries of music on computer hard drives and/or subsequently retransmit music on the Internet through file-sharing networks.¹⁰ As one group of commenters points out, consumers already have significant passive copying ability through certain kinds of digital audio tape recorders under the AHRA.¹¹ Notwithstanding this, however, BMI generally believes that the interactive copying activities enabled by the DAB technologies with built-in computer hard drives described by the RIAA are not covered by the provisions of the AHRA.¹²

As the Commission considers the RIAA’s proposals for DAB content protection, it should bear in mind that the RIAA’s proposals implicate copyright law questions that are the province of Congress and the courts. Therefore, any action taken by the Commission to establish copy protection systems must be cognizant of copyright law implications and must not derogate from or harm in any way the public performing right implicated by radio transmissions. The public performing right income of songwriters, composers and publishers from radio broadcasting is one of their biggest income streams. The public performing right is an integral part of domestic and international copyright law.

¹⁰ *RIAA Comments* at pp. 73-74.

¹¹ *Comments of Public Knowledge, Consumers Union and Consumer Federation of America* filed June 16, 2004 at pp. 6-7.

¹² Whether a given DAB receiving device comes under the statutory provisions of the AHRA will ultimately depend on the configuration and operation of the individual device, and will be decided by the appropriate legal authorities.

II. BMI's Access to Data Under Any Protection Regime Must Be Ensured.

BMI's fundamental role is to license the "public performing" right in musical works on behalf of its affiliated songwriters, composers and music publishers. The majority of these songwriters are neither performers nor major recording artists and therefore do not receive income from making sound recordings of their own music, or from concert tours, television appearances, commercial endorsements, sales of souvenirs or any of the other activities enjoyed by recording artists. As a result, the majority of BMI's affiliated songwriters are the ultimate "small businessmen and women" who depend on their BMI royalties for a major portion of their income.

BMI's primary concern in this proceeding is the protection of its affiliates' rights. In order to protect these rights and in order to make accurate royalty distributions BMI must not be technologically prohibited from freely monitoring digital radio airplay. If the Commission decides to adopt or approve DAB content protection technology that includes DAB receiving devices to respond to a digital rights management (DRM) method such as an encryption technology or a broadcast flag, the Commission must allow BMI to decode or decrypt any such DRM method if necessary in order to fulfill its customary roles of monitoring performances of music for royalty collection and distribution, and policing unlicensed performances. The content protection technologies proposed by the RIAA will be employed to enforce the usage rules and output restrictions contained in RIAA's proposals discussed in the attached report of Mr. Jeff Hamilton. Aspects of these proposed usage rules pose a problem for BMI in its monitoring functions. Simply put, if digital outputs from DAB receiving devices must observe the usage rule restrictions sought by the RIAA, BMI's automated monitoring capabilities will be disabled

unless the Commission's rules provide an exemption that permits performing right organizations authorized access to the content.

As BMI has previously advised the Commission in connection with the Plug & Play and Broadcast Flag proceedings (which involve similar issues regarding the transition to digital television), the livelihood of songwriters and composers depends on the performing right organizations' ability to monitor performances on a cost efficient basis.¹³ BMI has invested and continues to invest in technology that can analyze the performance of musical works using technologies that automate the very costly process of monitoring airplay with substantial gains in accuracy and reductions in costs. BMI has also entered into partnerships with companies such as Nielsen BDS, MediaBase and Shazaam which have advanced monitoring technologies. Such technologies benefit BMI's affiliates who depend on complete and accurate monitoring of radio airplay. Adoption of rules that preclude BMI from obtaining digital audio broadcast data will adversely affect BMI's ability in the future to compensate the hundreds of thousands of songwriters and publishers in a cost efficient manner. This, in turn, will reduce the creation of new musical works in the future.

¹³ *Joint Reply Comments of the National Music Publishers' Association, the American Society of Composers, Authors and Publishers, the Songwriters Guild of America and Broadcast Music, Inc.*, Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment (CS Docket No. 97-80 and PP Docket No. 00-67), submitted April 28, 2003; *Reply of Broadcast Music, Inc. and The American Society of Composers, Authors and Publishers To Oppositions To Joint Petition For Reconsideration*, Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment (CS Docket No. 97-80 and PP Docket No. 00-67), submitted March 24, 2004; Letter of ex parte contact between BMI and ASCAP and Commission staff, Ex Parte Communication CS Docket 97-80 and PP Docket 00-67 dated May 13, 2004.

III. Conclusion.

BMI is concerned that without a recognized exemption, whatever DAB content protection regime the Commission might adopt will hamper BMI's ability to monitor public performances and collect appropriate licensing royalties. Therefore, it is critical that any regulations adopted by the Commission allow performing right organizations such as BMI an exemption for the limited purpose of monitoring digital audio broadcasts so that such organizations may continue to protect the public performing rights of their affiliated songwriters, composers and music publishers.

Respectfully submitted,

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